No. 16345

United States
Court of Appeals
for the Ninth Circuit

GERMANA E. PRADO DEL CASTILLO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Arizona

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This reply brief is going to be concise, since Appellee in its brief has confined its arguments to the points we raised in our opening brief, except its third argument. It seems necessary only to examine a few of Appellee's statements and supporting authorities and to deal with its third argument.

The roman numeral headings of the present reply brief are keyed to the points argued in our main brief, and also to the arguments in Appellee's brief.

I

The Government, in a court of law, is governed by the rules of procedure like any other litigants. United States v. Alexander, 47 F. Supp. 900.

In view of Government's statement concerning its "regret the misunderstanding of Appellant's counsel on this matter" of its motion to dismiss and the question it raised, we are per force compelled to register that we are aggrieved.

Appellant's counsel respectfully submits the record to speak for itself and the rules of law provided for. If interpreting the rules as this Court has so construed and applying it to facts stated by the Government is "misunderstanding," we have need of words to communicate the plain, common things to our senses. Our understanding, or otherwise, we submit to the determination of the Court as may be disclosed in Appellant's Argument, FIRST POINT upon our specification of error No. I, in our opening brief.

The Government had defined the field of controversy, set up the rules of the game, and took to bat. We, the Appellant, simply followed the rules and played the game accordingly. We have neither apologies to make, nor alibi to set forth.

II

We agree with Appelle's statement in its recital of the legislative history (Appelle's Br.-6) that "in 1948 it [38 U.S.C.A. 802 (d) (5)] was again amended to extend the period for filing a claim from five years to seven years. S. Rep. 902, 80th Cong., accompanying the bill effecting this latter change makes it clear that Congress had in mind the situation of claimants, such as the Appellant, who resided in the Philippine Islands." Our argument on this point is as Congress intended.

The main core of Appellee's second argument is the case of De Yaranon vs. United States, 152 F. Supp. 644, stating that said "case is similar to the

one herein involved wherein the Court considered the application of the limitation provision of 38 U.S.C. 445 and dismissed the plaintiff's Complaint for want of jurisdiction."

We definitely differ, and state that any similarity between the De Yaranon Case and the one at Bar is solely in the class of cases they belong to, as homos sapiens residing in the Philippines may be said to be similar. In parallel columns, we shall show the obvious disimilarity of the two cases:

FACTS in **De Yaranon** case:	FACTS in the case at Bar:
From stipulated facts as pertinent:	
Plaintiff filed her claim with Veterans' Administration on ..... **Feb. 9, 1950**	Plaintiff filed her claim with Veterans' Administration on..... **June 11, 1948**
The serviceman died on..... **May 15, 1942**	The serviceman died on ..... **April 3, 1942**
Period of time 7 yrs. 8 mos. 25 days	Period of time 6 yrs. 2 mos. 9 days
Claim finally denied by Board Veterans' Appeals on ..... **Dec. 23, 1952**	Claim finally denied on appeal to Board of Veterans' Appeals on **Jan. 8, 1958**
Complaint filed on ..... **May 23, 1955**	Complaint filed on..... **Feb. 24, 1958**
2 yrs. 5 mos.	47 days

To start with, the De Yaranon claim was rejected by the Veterans' Administration for the reason that it was filed after seven years, which is too late for any purpose. Appellant's claim was not rejected on this point. TR—22-23.

Now let us check the above facts against the provisions of the law applicable, which are as follows:

Section 802 (d) (5) of Title 38 U.S.C. provides that:

" . . . no application for insurance payments under subsection (d) (2) or (3) of this section, shall be valid unless filed in the Veterans' Administration

within SEVEN YEARS *after date of death of the insured . . . " (capitals supplied)*

....In the event of any disagreement as to any claim arising under §802 (d) (3) (B)

" . . . no suit . . . shall be allowed . . . unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: Providedd further, That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affairs. Infants, insane persons, or persons under other legal disability, or persons rated at incompetent or insane by the Veterans' Ad ministration shall have THREE YEARS *in which to bring suit after the removal of their disabilities . . . . " 38 U.S.C. §§ 445, 817. (capitals supplied)*

In the case of De Yaranon vs. United States, supra, the Court says:

"(3) Even if hostilities prevented plaintiff from filing her claim promptly after the death of the insured and this could be regarded as creating a "disability," the disability exception of the statute would not have extended the time for filing the action beyond September 2, 1948, three years after the termination of hostilities. Soriano v. United States, supra, 352 U.S. at page 276, 77 S. Ct. at page 273."

The facts in De Yaranon case checked against the law, we find that De Yaranon having filed her claim 7 years, 8 months and 25 days, after the death of her son, is too late in every point of law. The proposition of law advanced by this herein Appellant in our main brief under the Second Point would not ap-

ply to her, nor available in her case. Even if, as the Court in said case held, the hostilities between Japan and the United States created a "disability" under the disability exception of the statute quoted above extending the time of her filing her claim up to September 2, 1948, De Yaranon is still too late, having filed her claim on Feb. 9, 1950.

Such is not the case with the Appellant herein. Appellant filed her claim June 11, 1948, 2 months and 22 days within the extension of the statute of limitation as provided. On Appellant's filing, the statute of limitation was suspended, as provided, leaving her 2 months and 22 days before the time of filing of her action would have run out. Her claim was finally rejected by the administrative agency on Jan. 8, 1958; and she brought action on Feb. 24, 1958, that is, 47 days from date of final rejection or 45 days after receipt of it. Therefore, Appellant has brought her suit 37 days within the statutory limitation provided in § 445, 38 U.S.C.

That a Philippine resident at the time of the war with Japan was under a legal disability while the hostilities continued within the purview of such exception in § 445, 38 U.S.C. has been passed upon the United States Supreme Court. Another pertinent excerpt of the Court's opinion is to be found in Appellant's main brief at page 34-35. Such "disability" would have extended Appellant's time to bring her suit to September 2, 1948, had not her filing her claim on June 11, 1948, suspended the operation of the statute of limitation, as provided, leaving her 2 months and 22 days before her time would have run out. When the statute again began to run after Jan. 8, 1958, when she received the final rejection of her claim by the administrative agency, she filed her suit one month and a half later, with 47 more days to go before the deadline.

It is very clear we respectfully submit that Appellant has brought action on her claim within the stat-

ute of limitation under either of the prospositions we urge in our main brief.

III

In dealing with Appellee's Argument III, which appears to be a new argument advanced rather than one controverting the third specification of error in Appellant's main brief, it seems to us that the Appellee, in bringing into its argument an opinion in the case of Soriano vs. United States, 352 U.S. 270, has completely missed the question involved.

The question decided in the portion of the opinion quoted by Appellee in said case has no connection with that raised by the facts and the statute under consideration in the case at Bar. The facts, the cause of action, and the statutes involved are different in the two cases.

Right off the first sentence of the opinion quoted by the Government the disimilarity sticks out like a sore thumb, as follows:

> " . . . The cause of action as alleged by petitioner was for just compensation for supplies, etc., taken from him by guerrillas during the Japanese occupation of the Philippines."

Whereas, the cause of action in the case at Bar is upon National Service Life Insurance, and of a special one, automatic free insurance, provided by a special legislation designed for a purpose. § 802 (d) (3) (B), 38 U.S.C., Paragraph (5) of same section. And the jurisdictional statute involved are: 38 U.S.C. 445, 445d, and 38 U.S.C. § 817. The opinion quoted by the Government did not pass upon these statutes, except conceded the period on "disability."

Whereas, in herein Appellant's claim, the statute (§ 445) provided that a claimant must first pursue and exhaust her administrative remedies, and required the existence of a disagreement as pre-re-

quisite to bringing an action and for a court taking jurisdiction, this is not so in the case of the Soriano claim for requisitioned provisions. Hence, the Soriano claim does not enjoy the suspension of the statute of limitation as provided in Section 445, nor the exceptions and extension provided in case of "Infants . . . or persons under other legal disability . . . "

For lack of such specific extension, expressly provided, the Soriano counsel attenpted to develop the theory that the Japanese occupation of the Philippines tolled the statute of limitation. This theory was rejected by the Court, which stated that the Hanger vs. Abbott, 6 Wall. 532, could not support his position. The Government counsel appearing in the Soriano case urged in his brief that the principle of Hanger vs. Abbott is not applicable in the Soriano case as against the United States since it "can only be sued to the extent that consent has been expressly granted by statute." 1L. ed. 2d 1816.

Appellant herein made use of the opinion in Hanger vs. Abbott, among others, since, in the Appellant's cause of action, the government expressly provided its consent to be sued and upon certain terms. Among these terms is: "Infants, . . . or persons under other legal disability" has an extension of three years within which to sue after removal of their disability. Appellant in her main brief, THIRD POINT in the Argument, (B), tried to reach the same result that is discussed in (A) of same point, that is: that persons residing in the Philippines during the hostilities in our war against Japan were persons under legal disability during that period.

We quoted the Soriano case, the part in which the Court passed upon the "disability" created by the Jap hostilities upon persons residing in the Philippines (Appellant's Br.—34-35), and we herein quote more from the Soriano case, supra, at page 276, as follows:

" . . . Furthermore, even if hostilities prevented

petitioner from filing his claim and this condition could be regarded as creating a "disability," the claim would nonetheless be barred by the express terms of this statute because not filed within three after the cessation of hostilities, to wit, before September 2, 1948. . . ."

Here, again, is where the claimant in the Soriano case and the Appelant's herein differ. The Appellant filed her claim on June 11, 1948, within the statutory terms under § 445 as well as within the proviso of Paragraph (5), § 802 (d) (3) (B), 38 U.S.C. of seven years, as discussed more than once more fully heretofore. And we say again that on filing her claim, the statute was suspended from that day on to January 8, 1958, or three days thereafter. When it began to run again, before the remainder of her time could expire, Appellant brought suit on February 24, 1958.

The opinion of the Court in holding that the Japanese occupation created a "disability" to persons residing in the Philippines during the period of hostilities seems to us fair enough. For it is a judicial knowledge that until Gen. MacArthur returned and liberated the Philippines and hostilities ceased, the persons therein were really "disabled." The Congress in tendering to those fighting men by a special legislation, for a special patriotic purpose, an automatic free life insurance, knowing that the men fighting for the nation's flag and her honor would likely perish than survive, was designedly giving the indemnity for the benefit of the serviceman's beneficiaries. The insured's beneficiaries at the time it was given had six years under the statute within which to sue for it. The Japanese occupation lasting actually about four years would have prevented the insured or his beneficiaries from making a claim or suing the United States.

The Government could not expect the claimants to file their claims from concentration camps, from

the hideouts in the jungle, or to communicate with a United States court across the Pacific ocean, were any form of communication by private persons was possible, or with a lawyer in the United States. How ridiculous could the Government be in invoking a strict and narrow interpretation of the statute? And the years of Japanese occupation was an actual and real deterrent, which would have cut off half of their right to sue within the period of six years. Congress promised its beleaguered fighting men a full loaf of bread for their widows and mothers and kin, and the government, by insisting that the Japanese occupation did not create a disability of three years, would cut it into half a loaf, and by so doing snatch it back altogether. How far could the Government go to be unjust? The March of Bataan could well be forgotten among us in our land of plenty, now secured, our days of insecurity having been tided over by the fighting men of the "automatic life insurance" class; we are safe and have no cause to think of any writing on the wall; but, nevertheless, however lulled our senses be, a ghostly march of ideas has been marching in a long cue treading over each print of a sorefoot that marched out of Bataan, and the eyes in these faces are not glaring at the Japs as those in the March of Bataan did.

The Courts, time and again, wisely say: this section (445) should be construed in favor of claimant on question whether it has been complied with whenever possible in borderline cases. Appellant herein stands square on two legal propositions of law to show and urge upon this Court that she has filed within the statute of limitation, and hereby repeats her prayer in her main brief.

Respectfully submitted,

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June 17, 1959.